

87-1464

No. 87-

Supreme Court, U.S.
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JOSEPH E. SPANIOL,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

SPIRO T. AGNEW and WILLIAM H.
WOOLVERTON, JR.,

Petitioners,

— against —

ALICANTO, S.A. and WILLIAM H. SHAW,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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ENGEL & MULHOLLAND
February , 1988

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of December, one thousand nine hundred and eighty-seven.

P r e s e n t: HONORABLE WILLIAM H. TIMBERS,

HONORABLE THOMAS J. MESKILL,

HONORABLE GEORGE C. PRATT,

Circuit Judges.

SPIRO T. AGNEW and WILLIAM H.
WOOLVERTON, JR.,

Plaintiffs-Appellants,

v.

Docket No. 87-7456

ALICANTO, S.A. and WILLIAM H.
SHAW,

Defendants-Appellees.

This is an appeal from an order of the United States District Court for the Eastern District of New York, Weinstein, *C.J.*, dissolving a temporary restraining order and denying plaintiffs-appellants' motion for an order of attachment.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The appeal is DISMISSED for lack of jurisdiction.

We have jurisdiction only over appeals from final orders. 28 U.S.C. § 1291 (1982). We have stated that orders refusing to

confirm attachments ordered *ex parte* under New York law are not appealable final orders, and in doing so we equated such orders with those, like the one in the instant case, that merely refuse to grant attachments. See *Dayco Corp. v. Foreign Transactions Corp.*, 705 F.2d 38, 40 (2d Cir. 1983). See also 9 J. Moore, B. Ward & J. Desha Lucas, *Moore's Federal Practice* ¶ 110.13[5] at 171 (2d ed. 1987) (order denying attachment ordinarily non-appealable). As in *Dayco*, the order here also lacks finality because it is subject to a renewed motion upon a showing of changed circumstances.

Moreover, we do not believe that this case falls within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Appellants argue that the Supreme Court's application of *Cohen* in *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684 (1950), obliges us to hold the order below to be appealable. In *Swift*, the Court held that an order vacating an attachment was appealable, *id.* at 689. But in *Dayco*, we distinguished orders denying or refusing to confirm orders of attachment, which are not appealable, from orders vacating attachments, which are. The instant case falls into the former category.

Furthermore, the *Dayco* Court also observed that both *Swift* and *Cohen* involved significant and unsettled questions of law that bolstered the argument for allowing an immediate appeal. In *Dayco*, as in the case before us today, the order appealed from merely applied settled law to disputed facts. See *Dayco*, 705 F.2d at 40. "[I]nterlocutory appeals of essentially factual questions are especially disfavored." *In re Committee of Asbestos-Related Litigants*, 749 F.2d 3, 5 (2d Cir. 1984) (citing *Dayco*, 705 F.2d at 40).

Dayco's interpretation of the collateral order doctrine governs the appealability of this order. We accordingly dismiss for lack of jurisdiction. We express no opinion on the merits of either the motion for order of attachment or the underlying case.

/s/ Wm. H. Timbers
William H. Timbers, U.S.C.J.

/s/ Thomas J. Meskill,
Thomas J. Meskill, U.S.C.J.

/s/ George C. Pratt
George C. Pratt, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON,

Plaintiffs,

— against —

ALICANTO, S.A. and WILLIAM H. SHAW,

Defendants.

----- X -

CV-86-4321 (JBW)

ORDER DISSOLVING TEMPORARY
RESTRAINING ORDER, DENYING MOTION
FOR AN ORDER OF ATTACHMENT AND
DENYING MOTION FOR REARGUMENT AND
FOR A STAY PENDING APPEAL

Plaintiffs having moved by order to show cause dated December 30, 1986 for an order of attachment and for an *ex parte* temporary restraining order, and the Court having granted said temporary restraining order, and

Pursuant to said temporary restraining order the sum of \$341,843.70 having been deposited with the Clerk of the Court in an account held by Citibank, Branch 51, 181 Montague Street, Brooklyn, New York 11201, and \$38,016.32 having been restrained in accounts held at the Marine Midland Bank and the Bank of Boston International, and

The plaintiffs having submitted in support of the motion for an order of attachment the December 24, 1986 affirmation of Robert P. Knapp, Jr., counsel for plaintiffs; the August 18, 1986 affidavit of Spiro T. Agnew; the August 21, 1986 affidavit of

William H. Woolverton; the August 6, 1986 affidavit of James W. Green; and a memorandum of law, and

The Court having so ordered a stipulation of the parties on April 7, 1987 requiring defendants to submit their papers in opposition to said motion for an order of attachment (and in support of a motion for summary judgment) on or before April 24, 1987, and requiring plaintiffs to submit any responsive papers by May 15, 1987, and

The defendants having submitted in opposition to said motion for an order of attachment and in support of defendants' motion for summary judgment defendants' April 23, 1987 memorandum of law; the April 22, 1987 affidavit of Jeffrey G. Stark, one of the defendants' attorneys; the April 9, 1987 affidavit of Professor Alejandro Miguel Garro; the April 2, 1987 affidavit of Augustus P. Schneidau; the April 3, 1987 affidavit of John R. Hettinger; the April 21, 1987 affidavit of Kenneth A. Nelson; the April 22, 1987 affidavit of William H. Shaw; the transcripts of the April 2, 1987 deposition of plaintiff Agnew and the April 10, 1987 deposition of plaintiff Woolverton, and

Plaintiffs having moved for an extension of time to answer defendants' motion for summary judgment and having submitted the affirmation of Robert P. Knapp, Jr. dated May 8, 1987 and a memorandum of law in support of said motion, and

Defendants having opposed said motion for an extension and having submitted the May 13, 1987 letter of William J. Cunningham, III, one of the attorneys' representing defendants, opposing plaintiffs' motion for additional time to respond to defendants' motion for summary judgment and requesting that plaintiffs' motion for an order of attachment be decided upon the papers theretofore submitted by plaintiffs and defendants, and

Plaintiffs having submitted a May 13, 1987 letter of plaintiffs' counsel, Robert P. Knapp, Jr., requesting that plaintiffs be given until June 19, 1987 (from May 15, 1987) to answer defendants' motion for summary judgment and opposing defendants' request that the attachment motion be decided upon the papers theretofore filed, and

The Court having heard oral argument on May 14, 1987 and having issued an oral decision finding that plaintiffs had not shown good cause to extend the hearing date on the December 30, 1986 temporary restraining order as required by F.R.C.P. 65(b) and that plaintiffs had failed to show a probability of success on the merits of their claims as required by CPLR 6212, and

Plaintiffs having moved for reargument of the Court's decision vacating the temporary restraining order and denying plaintiffs' motion for an order of attachment, or in the alternative, for a stay pending appeal, and having submitted a memorandum of law and the affirmation of Robert P. Knapp, Jr., dated May 19, 1987 and the affidavit of William H. Woolverton, Jr. sworn to May 19, 1987 in support of said motion, and defendants having submitted the affirmation of Jeffrey G. Stark, Esq., dated May 26, 1987 and a memorandum of law in opposition to said motion, and in support the affirmation of Robert P. Knapp, Jr. dated May 27, 1987 and the affidavit of William H. Woolverton, Jr. dated May 26, 1987.

NOW, upon motion of Meyer, Suozzi, English & Klein, P.C., it is, ordered that the motion for reargument is granted, and upon the original motion and all subsequent proceedings, it is

ORDERED, that plaintiffs' motion for an extension of the hearing date on their *ex parte* temporary restraining order is denied on the ground of plaintiffs' failure to show good cause therefore as required by F.R.C.P. 65(b), and because no good cause has been shown for an extension; and it is further

ORDERED, that the parties may move upon fifteen days notice for a temporary restraining order with an evidentiary hearing to be arranged by this court, it is further

ORDERED, that the plaintiffs' motion for an order of attachment is denied, with leave to renew upon a showing of further merit, on the ground that plaintiffs have not shown a probability of success on the merits as required by CPLR 6212; and it is further

ORDERED, that the temporary restraining order contained in the order to show cause dated December 30, 1986, a copy of which has been served upon the Marine Midland Bank and the Bank of Boston International, is vacated and is deemed null and void as of the date of this order as to those persons and any other person served with a copy of said order; and it is further

ORDERED, that the Clerk of the Court is directed to release to defendant William H. Shaw the sum of \$341,843.70 plus interest thereon, which is currently held in an Insured Market Rate Account at Citibank Branch 51, located at 181 Montague Street, Brooklyn, New York 11201, pursuant to this Court's February 26, and March 10, 1987 orders, and that said monies shall be released in the form of a Citibank check payable to the order of Meyer Suozzi, English & Klein, P.C., as attorneys for William H. Shaw; and it is further

ORDERED, that plaintiffs' undertaking filed in connection with the December 30, 1986 temporary restraining order shall continue in full force and effect and shall be available to pay to defendants all costs and damages, including reasonable attorney's fees, sustained by reason of the temporary restraining order; and it is further

ORDERED, that plaintiffs shall serve and file their papers in opposition to defendants' motion for summary judgment on or before June 19, 1987, with defendants' reply, if any, to be served and filed on or before July 2, 1987, with the matter returnable before this Court on July 7, 1987 at 9:30 a.m., 225 Cadman Plaza East, Brooklyn, New York, Courtroom 10; with leave to either party to apply for further extensions of any of these dates by letter; and it is further

ORDERED, that plaintiffs' motion for a stay pending appeal is granted for 10 days to permit an application to the Court of Appeals for a further stay (the court expressing no view as to the disability of an intermediate appeal).

May 27, 1987

/s/ Jack B. Weinstein

U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
SPIRO T. AGNEW & WM. H. WOOLVERTON JR.,

Plaintiff,

— against —

ALICANTO S.A.
WM. H. SHAW,

Defendant.
----- x

CV 86 4321

United States Courthouse
Brooklyn, New York

May 14, 1987
9:30 o'clock a.m.

TRANSCRIPT OF CIVIL MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiff: ROBERT P. KNAPP, JR., ESQ.

For the Defendant: MEYER SUOZZI ENGLISH & KLEIN

WILLIAM J. CUNNINGHAM III,
of counsel

Court Reporter: Marsha Diamond
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT: Yes, I will be glad to hear you gentleman.

MR. KNAPP: Your Honor, this is an application by the plaintiffs for an extension of time to answer the defendant's motion for summary judgment. This pile of papers represents the motion for summary judgment.

THE COURT: If you think you need more time I will give it to you but I have a problem with what happens to the money that has been seized or at least not seized; what have you done to it?

MR. CUNNINGHAM: Subject to restraint, Judge.

THE COURT: Yes. What about the \$400,000?

MR. CUNNINGHAM: Three hundred seventy thousand, Judge.

THE COURT: What are we going to do? We can't keep the man tied up.

MR. KNAPP: Well, Your Honor, that was their application. Your Honor will recall back when we had the previous conference before you I was for bringing that motion on, the motion for attachment on at that time. The defendants, however, requested that it be consolidated with our motion for summary judgment.

THE COURT: Well, I will give you all the time you need on the motion but I am not going to keep the money tied up. Is there a bond in the case.

MR. CUNNINGHAM: No, Judge, it is all cash. I am sorry, yes.

MR. KNAPP: We have bonded it yes.

THE COURT: I am going release the money. What are you going to do about the bond? I don't want to keep the bond.

I think you just should waive all liability and close this part of the case out; otherwise we will have the bond hanging over.

MR. CUNNINGHAM: The bond is used to secure defendants for their assets being tied up on this too. So I don't think there is any need for the bond if the assets are released.

THE COURT: Bond is released. So are the funds. How much time do you want?

MR. KNAPP: I wanted June 19, but I would like to submit —

THE COURT: Take as much time as you want.

MR. KNAPP: On the attachment I would like to submit something.

THE COURT: It is on a TRO now; isn't it?

MR. CUNNINGHAM: Yes.

MR. KNAPP: Yes, Your Honor.

THE COURT: Now, they are not consenting to an extension, as I understand their papers.

I am not going to continue it. I don't believe, based on the papers I have seen there is a substantial basis for the case as it now stands; and I don't think it is fair to hold this man's money during this period while you need more time.

MR. KNAPP: Well, it was their request that the attachment be put over until this motion for summary judgment was decided.

THE COURT: I understand but it is now being delayed at your request. It seems to me that fairness requires that both sides give something. They will have to give time and you will have to give the money.

THE COURT: I just don't think it is fair to keep their money tied up.

All right. Submit an order on it. You can have all the time you want. I don't want to pressure you. It is a difficult case. They submitted a lot of papers. I certainly am not going to lean on you.

How much time do you want?

MR. KNAPP: I ask for June 19.

THE COURT: Fine. You can have it.

MR. KNAPP: There is another matter. I take it, it goes before the magistrate. I noticed the deposition of the defendants but they have refused to appear.

THE COURT: Why aren't they appearing?

MR. CUNNINGHAM: They are not appearing in connection with the motion for summary judgment because when we were before the magistrate to set up discovery on this matter as well as briefing schedule, the only discovery that was requested was by defendants. We went ahead and deposed.

THE COURT: Have them appear. I want their deposition given.

MR. CUNNINGHAM: My only objection is that we are now in the context of a motion for summary judgment. I think the case law and the rule requires that if Mr. Knapp requires their testimony —

THE COURT: I am telling you to give it to them. Obviously it may be critical to a motion for summary judgment. He is entitled to have it; otherwise he is going to respond by saying he can't respond. I mean he is a good lawyer and so are you. I guess that is what is going to happen. I am not a very good lawyer but that is what happens.

Give him his deposition.

MR. CUNNINGHAM: We just asked the one witness that Mr. Knapp has asked to be deposed. It is a party who resides down in Argentina. Periodically he travels to the United States.

THE COURT: Whether is he going to be here next?

MR. CUNNINGHAM: He is probably not going to be here until later this month. I don't have the exact date.

THE COURT: If you need more time on the motion you can have it. Arrange it.

Thank you gentleman.

THE CLERK: We have to make it June. Was June the date for filing your papers.

MR. KNAPP: Yes.

MR. CUNNINGHAM: I would ask for a week to reply and then schedule.

THE CLERK: July 1 is the return date.

THE COURT: Thank you very much, gentlemen. You better submit an order.

MR. CUNNINGHAM: I will Judge.

THE COURT: Have it or you will have the attachment and bond problem.

MR. CUNNINGHAM: Yes. It will be done today.

(Proceedings concluded.)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of January one thousand nine hundred and eighty-eight.

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,

Plaintiffs-Appellants,

v.

ALICANTO, S.A. and WILLIAM H. SHAW,

Defendants-Appellees.

No. 87-7456

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, Spiro T. Agnew and William H. Woolverton, Jr.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

Elaine B. Goldsmith,
Clerk

Agnew et al.

v.

87 - 7456

Alicanto et a.

*Docket Number**Use short title*

NOTICE OF MOTION

*state type of motion*for Stay or recall of mandate

* * EXTRANEAE NOT REPRODUCED * *

Judge or agency whose order is being appealed:

Honorable Jack B. Weinstein, U.S. District Judge, Eastern District of New York

Brief statement of the relief requested: Stay or recall of the mandate because court's order denying petition for rehearing, filed January 21, 1988, postmarked January 22, 1988 was received by petitioners' attorney only today, January 28 1988, leaving no time for possible application to the United States Supreme Court for stay pending petition for certiorari.

By (*Signature of attorney*)Appearing for:
(*Name of party*)Appellant or
Petitioner:
☒ Plaintiff
☐ Defendant
Appellee or
Respondent:
☐ Plaintiff
☐ Defendant
/s/ Robert P. Knapp Jr.January 28, 1988Signed name must be
printed beneath

Date

ORDER

Kindly leave this space blank

Construing appellants' motion filed 1/28/88 as one for a stay of the mandate pending application for a writ of certiorari pursuant to FRAP 41(b), the motion is *granted* and appellants are directed to comply with Rule 41(b).

/s/ William H. Timbers

William H. Timbers, USCJ (by TJM)

/s/ Thomas J. Meskill

Thomas J. Meskill, USCJ

/s/ George C. Pratt

George C. Pratt, USCJ (by TJM)

2/3/88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAYCO CORP.,

Plaintiff,

— against —

FOREIGN TRANSACTIONS CORP., et al.,

Defendants and Third-Party Plaintiffs,

— against —

RICHARD J. JACOB, et al.,

Third-Party Defendants.

MEMORAN-
DUM OPIN-
ION AND
ORDER

82 Civ. 3354
(MJL)

APPEARANCES:

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Attorneys for Plaintiff
2101 L Street, N.W.
Washington, D.C. 20037

BY: LEONARD GARMENT, ESQ.
SIDNEY DICKSTEIN, ESQ.
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SHEA & GOULD
Attorneys for Defendants/Third-Party Plaintiffs
330 Madison Avenue
New York, New York 10017

BY: MILTON GOULD, ESQ.

MARY JOHNSON LOWE, D. J.

INTRODUCTION

Plaintiff Dayco Corporation ("Dayco") commenced this litigation on May 24, 1982 and applied for an *ex parte* order of attachment of defendants' assets on June 11, 1982. After a hearing the same day, the order was granted.¹ Plaintiff thereafter moved to confirm the attachment,² for which motion oral argument was heard during prolonged sessions on August 4 and August 24, 1982. In addition to their oral presentations, the parties have supplied the Court with a number of affidavits and well-presented supporting and opposing briefs. After due deliberation, and for the reasons stated below, the Court denies plaintiff's motion to confirm.

¹ At the time, the Court approved the posting of a bond in the amount of \$2.5 million, which has been undertaken by plaintiff.

² Under New York law, a party who has obtained an order of attachment without notice must move to confirm that order within five days after levy. N.Y. CPLR § 6211(b).

FACTS

Dayco is a Delaware corporation with primary place of business in Dayton, Ohio. Complaint, ¶5. It is engaged, *inter alia*, in the manufacture and selling of "rubber and plastic component parts, including V-belts and hose," *id.*, which products are sold internationally. Dayco alleges that, over the course of the past three years, the individual and corporate defendants³ participated in a scheme to defraud the company of millions of dollars in advance commissions for nonexistent commercial orders from foreign trade organizations in the U.S.S.R. *Id.*, ¶¶12-22. Based on this scheme, and Dayco's resulting manufacture of large quantities of hoses and belts to fill the fictitious orders, *id.* ¶ 16, Dayco asserts claims of fraud, breach of contract, breach of fiduciary duty, and violation of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and the federal civil RICO statute, 18 U.S.C. § 1962.⁴

The Reich defendants, in their answer and counter-claims, admit to some of the conduct charged by plaintiff. It is contended by defendants that, commencing in September of 1979, officers of Dayco, including the president, Mr. Jacob, entered into an agreement with the Reich defendants

pursuant to which, and at the specific request and urging of Jacob, Mrs. Reich agreed to furnish Dayco with orders (the "Anticipated Orders") for Dayco products

³ Defendants are the Foreign Transactions Corporation ("FTC"), Trachem Company, Limited ("Trachem"), Edith Reich, Brigitte Jossem-Kumpf, Judith A. Reich, and Michael Reich (hereinafter referred to collectively as the "Reich defendants"). Edith Reich is the director, president, and a shareholder of FTC and Trachem.

⁴ Plaintiff seeks damages against the defendants, jointly and severally, of \$25,000,000 on Claims I and II; \$13,000,000 on Claim III; \$25,000,000 on Claims IV, V and VI; punitive damages as to Claims V and VI; the imposition of a constructive trust on all commissions and payments to defendants plus all profits and proceeds therefrom. Additional injunctive relief and an award of attorneys' fees is also requested.

by USSR foreign trade organizations that Mrs. Reich anticipated would be, but had not in fact been, placed by such organizations. Jacob told Mrs. Reich that if she provided Dayco with the Anticipated Orders, Dayco would be able to keep its plants open and not lay off workers.

Jacob stated to Mrs. Reich that, when actual orders from the USSR materialized (the "Actual Orders"), they could be substituted for the Anticipated Orders that she agreed to furnish to Dayco, and assured her that there would be no problem for anyone as a result of the Jacob Agreement.

Under the Jacob Agreement, Jacob agreed to pay certain of the defendants advance commissions based on the Anticipated Orders. It was further agreed that these advance commissions would be applied against commissions earned by certain of the defendants when the Actual Orders were, in fact, placed by the USSR foreign trade organizations.

As part of the Jacob Agreement, pursuant to which certain of the defendants were paid approximately \$13,000,000 in advance commissions, Jacob demanded and received \$3,000,000 from certain of the defendants, which sum was paid to Jacob in cash and in money transfers in foreign countries, including Switzerland.

In order to conceal from Dayco's internal controllers and external auditors the fact that the Anticipated Orders were not firm orders that had been placed by USSR foreign trade organizations, Jacob, Gordon and Curry demanded that documentation (the "Documentation") be prepared evidencing that the Anticipated Orders were Actual Orders to that such Documentation could be furnished by them to such accounting personnel. The Documentation was prepared in late 1980 by certain of the defendants and by Stuart A. Jackson ("Jackson"), one of FTC's attorneys at the time. In connection with his role in

effectuating the Jacob Agreement, Jackson demanded, and was paid in excess of \$1,000,000 by certain of the defendants.

Answer of Reich defendants, ¶¶99-102, 104.

On the basis of the facts believed by it to be true, plaintiff moved an *ex parte* order of attachment on June 11, 1982, alleging that

the defendants, with the intent to defraud Dayco or frustrate enforcement of a judgment that might be rendered in Dayco's favor, have secreted or removed property from the state or are about to do these acts.

Plaintiff's Memorandum of Law at 2. Plaintiff also alleged the following jurisdictional facts:⁵

1. That there is an action in which Dayco is entitled to a money judgment (See Affidavit of Plaintiff (Ernest F. Dourlet));

2. that it is probable that the plaintiff will succeed on the merits (See Affidavit of Plaintiff and Affidavit of John Huhs, Esq., Special Counsel to Dayco);

3. that one or more grounds for attachment provided in §6201 exists (See Affidavit of Jeffrey M. Johnson, Esq.); and

4. that the amount demanded from the defendants exceeds all counterclaims known to Dayco (See Affidavit of Plaintiff).

⁵ The predicate jurisdictional elements are set forth in N.Y. CPLR § 6212(a):

On a motion for an order of attachment, or for an order to confirm an order of attachment, the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.

DISCUSSION

Under the heading of "Provisional and Final Remedies and Special Proceedings", Fed. R. Civ. 64 provides in relevant part:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available *under the circumstances and in the manner provided by the law of the state in which the district court is held*, existing at the time the remedy is sought [Emphasis added]

The applicable law of New York appears in N.Y. CPLR § 6201(3) *et seq.* Subsection three states that a plaintiff may obtain an attachment where "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts [.]" N.Y. CPLR § 6201(3) (McKinney Supp. 1964-79).

If a party is successful in obtaining an attachment without notice pursuant to N.Y. CPLR § 6211(a),⁶ he must move to

⁶ An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount to be secured by the order of attachment including any interest, costs and sheriff's fees and expenses, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment.

confirm the attachment pursuant to § 6211(b),⁷ at which time defendant(s) may produce evidence to demonstrate that there is no proper statutory basis for the attachment. New York law further provides:

§ 6223. Vacating or modifying attachment

(a) Motion to vacate or modify. Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court may give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

(b) Burden of proof. Upon a motion to vacate or modify an order of attachment the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy and the probability that he will succeed on the merits.

N.Y. CPLR § 6223 (McKinney Supp. 1964-1979). Thus, whether the garnishor is moving to confirm an attachment or the defendant is moving to vacate the attachment, the burden rests with the former to establish the basis for the attachment. In this case,

⁷ An order of attachment granted without notice shall provide that within a period not to exceed five days after levy, the plaintiff shall move, on such notice as the court shall direct to the defendant, the garnishee, if any, and the sheriff, for an order confirming the order of attachment. If plaintiff fails to make such motion within the required period, the order of attachment and any levy thereunder shall have no further effect and shall be vacated upon motion. Upon the motion to confirm, the provisions of subdivision (b) of section 6223 shall apply. An order of attachment granted without notice may provide that the sheriff refrain from taking any property levied upon into his actual custody, pending further order of the court.

the rule requires that plaintiff show that the defendants did or are about to assign, dispose of or encumber their assets found in this jurisdiction with intent to defeat a judgment against them.

a pre-judgment attachment cannot be ascertained or proven with certainty. Each case must be judged on its own merits:

What constitutes an intent to defraud creditors usually will depend on the facts and circumstances of each case; direct proof is almost never available. Although the cases abound with broad statements, they do not yield a standard capable of precise application. As a general rule, the court will approach the question by presuming that the defendant is not engaged in any fraudulent scheme so that any conduct consistent with honesty or good faith rarely will support an inference of fraud. On the other hand, the plaintiff need show only a probability of fraud to establish a *prima facie* case. He need not negative all of the possible honest motivations for the defendant's conduct; once he establishes that it is reasonable to infer an intention to defraud from the defendant's conduct, the burden shifts to the defendant to explain his action.

7A Weinstein, Korn & Miller, *New York Civil Practice* ¶ 6201.12 at 62-33 (1977) (footnotes omitted). To make out a *prima facie* case, therefore, does not require actual proof. Fraudulent intent may be established by an "unexplained disappearance of a substantial portion of the defendant's assets." *Id.* at 62-32.⁹ However:

⁹ Weinstein, Korn and Miller further write:

CPLR 6201(3) does not require that any specific portion of the defendant's assets to be transferred or secreted before an order of attachment can be granted. Presumably, the transfer or disappearance of an abnormal amount of property is all that is necessary. Care must be taken, however, that an attachment under
(Footnote continued)

Proof of assignment, disposition, secretion or removal of property or a likelihood that any one of these acts is imminent is not enough; proof of an intent to defraud creditors, or intent or [sic] frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, is an independent prerequisite for attachment under CPLR 6201(3). Some of the more relevant factors in deciding whether given acts were undertaken to defraud creditors or frustrate the enforcement of a judgment are the nature of the relationship between the transferee and the defendants, the defendant's financial condition at the time of the transfer and the adequacy of the consideration paid to the defendant.

Id. at 62-35 (footnotes omitted).⁹

In the present case, plaintiff relies on four factors to establish the necessary inference of intent to defraud or to frustrate the judgment:

1. "Mrs Reich is . . . a confessed swindler and fabricator of documents." Plaintiff's Third Supplemental Memorandum of Points and Authorities at 6.

CPLR 6201(3) is not resorted to as a means of interfering with the defendant's ability to make transfers in the ordinary course of his business.

7A Weinstein, Korn & Miller, *New York Civil Practice* ¶ 6201.12 at 62-32-33 (1977) (footnotes omitted).

⁹ Further, as to intent, the authorities write:

If there has been no disposal or secretion at the time the order is sought, the plaintiff's task is more difficult; it is much harder to prove that the defendant intends to do one or more of the proscribed acts in the future. The plaintiff can meet this burden by showing that the defendant has made declarations indicating an intention to dispose of his property or that the defendant has completed the preliminary steps for doing so.

Id. at 62-32.

2. Defendants have failed to explain the absence of funds in this jurisdiction traceable to the admitted \$13 million received as advance commissions from Dayco. *Id.* at 8.

3. FTC, one of the two corporate defendants controlled by Mrs. Reich, which is located in New York, "is insolvent — certainly unable to pay the substantial tax liability that has been incurred." *Id.* at 7.

4. "Mrs. Reich now admits to accumulating large sums of cash in safe deposit boxes, claims to have made payoffs to Dayco officials with monies obtained from secret businesses and bank accounts in Switzerland, and refuses to reveal the amount or location of her assets either in the State of New York or abroad." *Id.*

Each of these factors will be examined below with respect to the rebuttal evidence brought forward by defendants. While the Court agrees with plaintiff that it has made out an adequate, *prima facie* showing under § 6201(3), it also finds that defendants' evidence, explaining the relevant circumstances by way of personal knowledge affidavits and records has sufficiently rebutted the inference of intent to secret assets which could be used to satisfy judgment in favor of plaintiff.

1. *Prior Bad Acts*

One of plaintiff's primary theories is the defendants' prior, admittedly illegal conduct giving rise to the necessary inference of future intent under § 6201(3).¹⁰ For example, counsel argued:

What's sufficient becomes compelling in a rather unusual degree by the admissions of [sic] Mrs. Reich, careful, judicious admissions repeated in her testimony that she was engaged in criminal activity, that she took part, according to her allegations, in a plan that can

¹⁰ See Transcript of Hearing, dated August 4, 1982 at 5, 6, 34, and 40 (hereinafter cited as "Tr. 1 - ____"); Transcript of Hearing dated August 24, 1982 at 11, 14 (hereinafter cited as "Tr. 2- ____").

be carefully characterized as a swindle, that she, according to her allegations, paid large kickbacks to the president of the company — I might add that he denies this, but these are her allegations — and to two senior employees of the company.

That in the course of concealing this transaction, she alleges under oath, that she paid her attorney \$1 million to fabricate documents so as to conceal the wrongdoing from the company auditors and also to mislead public auditors and the regulatory agencies.

We have, in addition, the assertion that the moneys were paid from the safe deposit boxes to the recipients of the alleged kickbacks, and that these moneys were placed in the safe deposit boxes in part from FTC funds.

Tr. 2-11 to 12. From these alleged admissions, counsel argues that it is reasonable to assume that defendants *presently* intend to defraud and frustrate a judgment in its favor."

" This inference is grounded on the conduct alleged in the complaint, however plaintiff concedes that a showing based solely on the complaint is insufficient under the statute as amended in 1977. See Tr. 1-5, 7, 35 and 37. Plaintiff argues that there is sufficient nexus between the *admitted* prior misconduct and a present scheme to secrete or encumber assets to support the inference required under § 6201. Plaintiff argues:

This is emphatically not for the purpose of linking *plaintiff's allegations* to its request for an order confirming the attachment but rather putting *Mrs. Reich's sworn admissions and assertions* into context. Defendants wrongly accuse Dayco of returning to the pre-1977 practice that permitted attachments solely on the basis of allegations of fraud. In doing so they gloss over the substantial evidence presented by plaintiff and admitted to by Mrs. Reich to satisfy the Court that grounds for attachment exist apart from plaintiff's allegations.

Plaintiff's Second Supplemental Memorandum, p. 10, fn. 6.

Counsel for defendant contends that the statute [6201] was amended¹² just to preclude the use of claims of fraud alleged in the complaint, as the predicate for an inference of fraudulent intent to remove assets to frustrate the judgment. He argues that plaintiff must show, independently of the allegations in the complaint, that the secretion or *removal* of assets was done with intent to frustrate a potential judgment. Even though his client, counsel states, had admitted acting in concert with various officers of plaintiff corporation to submit false documentation in order to justify the commissions paid, his client denies that she transferred or secreted the proceeds with intent to defeat a possible judgment. The defendant Reich maintains:

[T]he fact remains that no assets have been removed from the State of New York and the defendants have done nothing to frustrate the enforcement of a judgment that might be rendered in this case. This fact can also be demonstrated by referring to the list of defendants' property which plaintiff seeks to attach As shown below, despite the institution of this action on May 24, 1982, none of the [defendants'] real or personal property . . . has been assigned, disposed of, encumbered, secreted or removed from the State of New York.

Affidavit of Edith Reich, sworn to on June 14, 1982, ¶6.

¹² *Weinstein Korn & Miller, supra*, note 8, §6201.17 at 62-37 observes that paragraphs 5, 6 and 8 of former section 6201 were amended.

Effective September 1, 1977, these provisions were repealed on the ground that the statute indulged in the unproven assumption that defendants charged with the stated wrongs were more likely to indulge in conduct frustrating the enforcement of a future judgment in plaintiff's favor than defendants in other cases. As noted by the Judicial Conference Report to the 1977 Legislature, [cite omitted] the provisions were of dubious constitutional validity and there was no reason why a defendant charged, for example, with conversion was more likely to tamper with his property than one sued for assault, wrongful death or negligence.

See *Reeder v. Mastercraft Electronics Corporation*, 297 F.Supp. 815, 817 (S.D.N.Y. 1969) for statement of former law.

It thus appears and the parties agree, that the above "admissions" of Mrs. Reich in and of themselves, do not give rise to the inference that she harbors a present intent to frustrate a judgment in this case, if one is obtained by plaintiff. Although plaintiff has alleged in its complaint and during oral argument that Reich has undertaken activities which would directly provide a link between past misconduct and present alleged fraudulent intent, those allegations of past acts cannot bolster an otherwise insufficient showing of a continuing plan to secrete assets.

2. *Disappearance of Funds*

The most persistent argument made by plaintiff to support an inference of fraud is that, while more than \$13 million was paid to defendants as advance commissions over a period of three years, at the commencement of this action, the money was not to be found in defendants' New York bank account and other assets.¹³ Plaintiff maintains that such a large amount of money could not have been used in the ordinary course of business and therefore must have been taken from the jurisdiction in order to defeat any judgment against them. *See, e.g.*, Tr. 1-6, 8, 10; Tr. 2-6, 8 to 9.

Following a preliminary indication from the Court that absent any rebuttal from defendants, the record could support a finding that the funds had been taken fraudulently from the jurisdiction, defendants procured the assistance of an outside expert, directed to review the relevant records for evidence of fraud. *See* Tr. 1-32. The defendant's expert, Sidney E. Connor, employed by the Criminal Investigation Division of the Internal Revenue Service as a Special Agent for 27 years, submitted an affidavit to the Court detailing his analysis, for the period October 1, 1979 to December 31, 1981, of the financial records of the defendants Reich, FTC and Trachem.¹⁴ The affidavit concludes:

¹³ *See, e.g.*, Tr. 1-3, 10; Tr. 2-6, 8 to 9.

¹⁴ Defendants's financial transactions, Connor affidavit, Appendix "A" is attached hereto and made a part hereof.

18. I have not found any evidence which leads me to the conclusion that there has been a deliberate plan to dispose of funds in an attempt to defeat the claims of Dayco or any other creditor.

Plaintiff argues in its Supplemental Memorandum at p. 7:

The plaintiff is, of course, not able to show whether over \$13,000,000 was used in the normal course of business or, more realistically, what really happened to the money. The whole notion of the grounds for attachment — removal or sequestration of assets — is that the funds have fled the state and cannot be accounted for. The case law solves this problem in holding that where “the nature of the transaction is such that plaintiff cannot furnish direct evidence but does set forth such facts as a reasonably prudent person would accept as *prima facie* proof, that is sufficient to withstand the motion on defendants’ proof unless the latter is so convincing as to compel a contrary conclusion.” *Atlantic Raw Materials v. Almarex Products*, 154 N.Y.S.2d 993, 996 (Sup.Ct. 1956.).

Plaintiff’s reliance on the general statement of law made by the Court in *Atlantic Raw Materials v. Almarex Products* is subject to the *caveat* noted *supra* at p. 10, “although the cases abound with broad statements, they do not yield a standard capable of precise appreciation.” The Court in *Atlantic Raw Materials* was ruling upon an application to vacate an attachment which had been previously ordered by another court.¹⁵ The original order was based *inter alia* upon a finding that the corporate defendant had made specified transfers of money into foreign bank accounts and its managing agent had told plaintiff that if plaintiff did not accept defendant’s offered settlement,

¹⁵ Plaintiff’s citation in its memorandum was to the second case, the first case, denying the motion to vacate as to the corporate defendant and granting the motion as to the individual defendant is found in 154 N.Y.S.2d 998.

the transfer of funds abroad would result in the corporate defendant having no assets with which to satisfy plaintiff's judgment. *Atlantic Raw Materials v. Almarex Products*, 154 N.Y.S.2d 998 1001 (Sup. Ct. 1956). It is instructive to note that the court held

The affidavit, however, throughout refers solely to the transfer of corporate property and is devoid of any statement showing a like transfer by the individual defendant of his own property. As to the individual defendant, therefore, the attachment cannot stand on either ground on which it was granted.

Id. at 1001.

The quotation relied upon by the plaintiff herein, was based upon the conclusion of the Judge at Special Term, on the second application to vacate the attachment, that the affidavits submitted by the defendant corporation were so hazy as to constitute insufficient evidence to dispel the finding of fraudulent transfer made by the court in the original proceedings.

The facts in the instant case are not comparable to those found by either the first or second court to consider the *Atlantic Raw Materials* attachment. In the present case there has been no evidence adduced that these defendants transferred funds from this jurisdiction with the expressed intent to frustrate a judgment which may be rendered in favor of plaintiff. The Connor affidavit, this Court finds, sufficiently refutes plaintiff's allegation of transfer of funds with the required statutory intent thereby shifting the ultimate burden of proof onto the plaintiff.

This Court further notes that plaintiff's insistent question "what happened to the \$13,000,000 dollars" may be the appropriate question in a supplementary proceeding to enforce a judgment after trial but it is not the essential question on a motion to vacate an attachment - here the statute posits the query - has plaintiff proven by a preponderance of the credible evidence that the defendant transferred its assets out of this jurisdiction in order to frustrate a potential judgment against it?

The second defect in plaintiff's argument is the assertion:

It is also well settled law that in determining whether plaintiff has sustained its burden " 'the court must give the plaintiff the benefit of all the legitimate inferences that can be drawn from the stated facts.' " *Nat. Bank & Trust Co., Etc. v. J.L.M. Intern.*, 421 F.Supp. 1269, 1272 (S.D.N.Y. 1976).^[16]

Reliance on *Nat. Bank & Trust Co.* is misplaced. That court made the above cited ruling in a case arising under New York's pre-1977 attachment law. It was in reference to the burden upon plaintiff to prove a prima facie case in support of the complaint upon which an attachment is based. That issue is irrelevant to the issue here under discussion *i.e.* defendant's intent to remove or secrete assets so as to frustrate a judgment. *Brezenoff v. Vasquez*, 433 N.Y.S.2d 553 (Sup. Ct. 1980).

The Appellate Division of the Supreme Court of the State of New York in *Eaton Factors Co. v. Double Eagle Corp.*, 17 A.D.2d 135, 232 N.Y.S.2d 901, 903 (1962), addressing a claim of secretion of assets under former Civil Practice Act §903, subdivision 3 explained:

In any event, the question here is whether or not there has been a sufficient showing of the existence of a fraudulent intent accompanying the alleged overt acts of the appellants. The mere removal or assignment or other disposition of property is not ground for attachment. There must coexist an intent of the debtor to defraud his creditors. From disposition of the property no presumption of intent to defraud arises. Such intent must be proved, and the facts relied upon to prove it must be fully set out in the moving affidavits. (10 Carmody-Wait, New York Practice 51.)

[2,3] "Fraud cannot be inferred; it must be proved" (cites omitted). The fact that the affidavits in support

¹⁶ Plaintiff's Supplemental Memorandum at p. 7.

of an attachment contain allegations raising a suspicion of an intent to defraud is not enough; (cites omitted) it must appear "that such fraudulent intent really existed in the mind of the defendants, and not merely in the ingenuity of the plaintiffs". (cites omitted) Thus, fraud is never presumed by a mere showing of the liquidation or disposal by a debtor of its business assets (*Nolan v. Louis Workman Co., Inc.*, 146 Misc. 99, 100, 261 N.Y.S. 534, 535, and cases cited). Here, too, the appellants are not to be deemed chargeable with fraud merely because, in connection with the liquidation of the corporate trucking business, they received a substantial sum in consideration of a limited agreement by them, as individuals, to refrain from engaging in such business. And also, here, the requisite showing of a fraudulent intent on the part of the appellants is not sufficiently made out by the alleged statements of certain of them to plaintiff to the effect that they had sold "out all of our assets" and that the plaintiff's judgment would be uncollectible. There was here no showing of a secreting or disposal of any particular assets of the appellants with intent to defraud their creditors.

See Reeder v. Mastercraft Electronics Corporation, 297 F.Supp. 815, 818-819 (S.D.N.Y. 1969); 297 F.Supp 820, 821 (S.D.N.Y. 1969); *Ester Lauder, Inc. v. Juda*, N.Y.L.J., Aug. 17, 1979 at p. 4 col.2 (Sup. Ct. 1979); *Banco Agricola y Pecuario v. Jiminez Export Corp.*, 97 N.Y.S.2d 437, 440 (Sup. Ct. 1950), *Wildman v. Van Gelder*, 14 N.Y.S. 914 (Sup. Ct. 1891).

The Court finds from all of the evidence and arguments that there has not been a sufficient showing of secreting or transferring funds so as to sustain plaintiff's burden of proof under §6201(b). While Mrs. Reich has admitted that she received commissions for fictitious orders and that she and her deceased husband paid bribes to others in execution of the fraudulent scheme alleged, these admissions are appropriate evidence on trial of the underlying cause of action but do not raise an inference that

because Mrs. Reich may have defrauded plaintiff in the past she has removed her assets to frustrate a potential judgment. See footnote 12, *supra*.

Although this Court finds that the affidavits submitted for the *ex parte* order of attachment were sufficient for that purpose and to shift the burden of rebuttal to defendant, the ultimate burden of proof under the statute remains at all times with the plaintiff.

This Court is persuaded that defendants have met their burden with a sufficient showing that the funds were used in the ordinary course of business. See Tr. 1-3, 26, 27, 32, and 37, and not to frustrate the enforcement of a judgment if one is obtained.

3. *Insolvency*

Although plaintiff has painted a picture of defendant FTC as a company "stripped clean" by Mrs. Reich, Tr. 2-8 to 9, the record does not support a finding that that corporation was failing at the time this lawsuit was commenced. Defendants have come forward with evidence to show that isolated overdrafts of bank accounts occurred as a normal part of the business, such that any given deficit would be an unreliable indicator of the company's soundness. The Court also rejects, as overly speculative, the theory that the large size of some of the expenditures of the defendant corporations is sufficient proof of phantom movement of funds or secretion of assets abroad. Defendants have demonstrated that money flow into this jurisdiction equalled or exceeded that transferred to England.

In summary, the record with respect to the financial stability of Mrs. Reich's business does not give rise to an inference of intent to secrete assets on the part of defendants.

4. *Safe Deposit Boxes*

Plaintiff finally alleges that Mrs. Reich and the other defendants participated in a conspiracy, which included the transfer of funds to safe deposit boxes and Swiss bank accounts in order to disguise the transfers. See Tr. 2-35. These allegations are countered by denials by Mrs. Reich. The suggested inference of present intent to defraud also is belied by Mrs. Reich's willingness now to make public the scheme in which she allegedly participated with plaintiff corporate officials.¹⁷ In addition, it must be pointed out that plaintiff's ambiguous and "sketchy" evidence with respect to the Swiss Banks and European transfers does not show that Mrs. Reich is likely to engage in acts to frustrate judgment in this pending action. While that evidence is *relevant*, the Court finds that it is not sufficient to withstand the ample showing on rebuttal that defendants have made use of the funds solely in the ordinary course of business.¹⁸

¹⁷ It is particularly relevant to the Court that Mrs. Reich has made disclosures during her deposition without invoking her Fifth Amendment rights with respect to illegal transfers of money in Europe and alleged bribes to corporate officials. See Tr. 2-13, 18, 25.

¹⁸ In the context of this case, "ordinary" does not imply "typical" or "average" with respect to other businesses. The proper test of whether defendants acted in the ordinary course of business is to ask whether defendants altered their customary conduct of business with respect to the *Dayco* commissions?

CONCLUSION

Based on all of the evidence and the arguments of counsel interpreting that evidence, the Court finds that defendants adequately have rebutted plaintiff's prima facie showing under N.Y. CPLR § 6201. Therefore, plaintiff's motion to confirm the attachment granted on June 4, 1982 is hereby denied.

It Is So Ordered.

Dated: New York, New York
September 27, 1982

/s/ Mary Johnson Lowe
United States District Judge